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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN EDWARD SWINDLER.....PETITIONER

vs.

STATE OF ARKANSAS.....RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN EDWARD SWINDLER — PETITIONER

V.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

Petitioner, John Edward Swindler, a prisoner under sentence of death, petitions for a writ of certiorari to review the denial by the Supreme Court of Arkansas of his petition for post-conviction relief.

QUESTIONS PRESENTED

I. Whether the Sixth and Fourteenth Amendment rights to effective assistance of counsel apply to the penalty phase of a bifurcated capital trial.

II. Whether due process in a capital case requires an opportunity to develop issues of ineffective assistance of counsel when ineffective assistance of counsel cannot be raised on direct appeal.

III. Whether a state statute that prohibits a second change of venue in a criminal case tainted by extensive prejudicial pretrial publicity violates a defendant's right under the Sixth and Fourteenth Amendments to trial by a fair and impartial jury.

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The opinion of the Supreme Court of Arkansas, not yet officially reported, appears in the Appendix hereto. The unofficial citation for this opinion is Swindler v. State, _Ark._, 617 S.W. 2d 1 (1981).

JURISDICTION

The opinion of the Supreme Court of Arkansas denying Swindler permission to proceed under Rule 37, Ark. R. Crim. P. (Repl. 1977) was rendered on April 20, 1981; petition for rehearing was denied on May 26, 1981. This Court's jurisdcition is invoked under 28 U.S.C.S. § 1257(3), with Swindler asserting here, and having asserted below, a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury...and to have the assistance of counsel for his defense.

Fourteenth Amendment, United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

Arkansas Statutes Annotated:

> 41-1301. The following procedure shall govern trials of persons charged with capital murder:
>
> (1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.
>
> *****
>
> (3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) hereof, and

to determine sentence in the manner provided by section 1302....

41-1302.

(1) The jury shall impose a sentence of death if it unanimously returns written findings that:

(a) aggravating circumstances exist beyond a reasonable doubt; and

(b) aggravating circumstances [outweight] beyond a reasonable doubt all mitigating circumstances found to exist; and

(c) aggravating circumstances justify a sentence of death beyond a reasonable doubt.

41-1304. Mitigating circumstances. - Mitigating circumstances shall include, but are not limited to the following:

(1) the capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) the capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;

(3) the capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;

41-1501. Capital murder. - (1) A person commits capital murder if:

(b) with the premeditated and deliberated purpose of causing the death of any law enforcement officer,... when such person is acting in the line of duty, he causes the death of any person:

43-1502. Application for order of removal. - The application of the defendant for such order of removal shall be by petition setting forth the facts on account of which the removal is requested; and the truth of the allegations in such petition shall be supported by the affidavits of two [2] credible persons who are qualified electors, actual residents of the county and not related to the defendant in any way. Reasonable notice of the application shall be given to the attorney for the State [prosecuting attorney]. The court shall hear the application and, after considering

the facts set forth in the petition and the affidavits accompanying it and any other affidavits or counter affidavits that may be filed and after hearing any witnesses produced by either party, shall either grant or refuse the petition according to the truth of the facts alleged in it and established by the evidence.

43-1507. Recognizance prerequisite to removal. - Second removal not allowed. - No order for the removal of a cause shall be effectual in the case of any defendant not in confinement or custody, unless a recognizance be entered into as herein directed, nor unless the order of such removal be delivered before any juror is sworn in the cause; and in no case shall a second removal of the same cause be allowed.

Arkansas Rules of Criminal Procedure:

Rule 37.1 Scope of Remedy

A prisoner, in custody under sentence of a circuit court and whose case was not appealed to the Supreme Court, claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

(a) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or

(b) that the court imposing the sentence was without jurisdiction to do so; or

(c) that the sentence is otherwise subject to collateral attack; may file a verified motion at any time in the court which imposed the sentence, praying that the sentence be vacated or corrected.

Rule 37.2 Commencement of Proceedings: Pleasings: Permission of Supreme Court Following Appeal.

(a) If the conviction in the original case was appealed to the Supreme Court, then no proceedings under this rule shall be entertained by the circuit court without prior permission of the Supreme Court.

(b) All grounds for relief available to a prisoner under this rule must be raised in his original or amended petition. Any grounds not so raised or any grounds finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or in any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence may not be the basis for subsequent petition.

STATEMENT OF THE CASE

Swindler was convicted of capital murder for killing a police officer in the line of duty in violation of Ark. Stat. Ann. § 41-1501(b) (Repl. 1977) and was sentenced to death by electrocution. The Arkansas Supreme Court reversed the verdict and death penalty because of the trial court's failure to grant a change of venue in the light of extensive prejudicial pretrial publicity. Swindler v. State, 264 Ark. 107, 569 S.W. 2d 120 (1978). On retrial venue was changed to an adjoining county (covered by the same news media) in accordance with the Arkansas law. Ark. Stat. Ann. § 43-1502 et seq. (Repl. 1977). Jury selection took five days and, because of opinions being expressed and in spite of Arkansas statutes permitting only one change of venue, which motion was denied. On October 26, 1978, Swindler was again convicted. No evidence was presented by Swindler at the sentencing phase of the trial and he was again sentenced to death. This conviction and sentence were upheld by the Arkansas Supreme Court. Swindler v. State, 267 Ark. 418, 592 S.W. 2d 91 (1979). Swindler filed a petition for writ of certiorari to review this decision and that petition was denied by this Court on December 8, 1980. Swindler v. Arkansas, cert. denied, __U.S.__, 66 L. Ed. 2d 511 (1980).

On March 16, 1981, Swindler sought post-conviction relief pursuant to Rule 37, Ark. R. Crim. P. (Repl. 1977). Swindler specifically sought permission for an evidentiary hearing to develop more fully issues which under Arkansas law could not be raised in his appeal. See Haynie v. State, 257 Ark. 542, 518 S.W. 2d 492 (1975). These issues dealt

with effective assistance of counsel and the right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Permission to hold a hearing was denied on April 20, 1981; petition for rehearing was denied on May 26, 1981. Swindler v. State, __Ark.__, 617 S.W. 2d 1 (1981). It is from that denial that this petition is being filed.

Subsequent to the denial, the Honorable Frank White, Governor of the State of Arkansas, set July 24, 1981, as Swindler's execution date. On July 21, 1981, the Honorable Harry F. Blackmun granted an extension of time through August 14, 1981, to file this petition and a stay of execution pending determination by the Court of this application.

In his petition to the Supreme Court of Arkansas Swindler assigned as error the following grounds that were not raised during direct appeal:

(a) The failure of the trial counsel and the trial court to insure steps were taken to assure that the jury was fair and impartial;

(b) The ineffectiveness of counsel in seeking a change of venue but failing to follow the minimum statutory requirements in seeking the change;

(c) The ineffectiveness of counsel in failing to request an investigation into opinions being expressed to potential jurors as they awaited voir dire;

(d) The ineffectiveness of counsel at the penalty phase of the trial by failing to investigate the possibility of or present witnesses in mitigation; by failing to object to evidence of an aggravating circumstance, a prior conviction, which was inadmissible; by failing to investigate psychiatric evidence for its use in mitigation.

In denying the petition the Supreme Court of Arkansas stated that the matters raised were bare allegations and, at best, mere errors of omission and not ineffectiveness. Since no evidence could be presented without a hearing, and no hearing could be held without permission, the Arkansas Supreme Court's ruling denied Swindler any meaningful review of his claim for post-conviction relief. From this denial, this petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS ENTITLED TO SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL MURDER TRIAL.

This Court has long held that the Sixth Amendment, through the Due Process Clause of the Fourteenth Amendment, guarantees to a defendant effective assistance of counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). This right involves active assistance of counsel in preparing a defense, securing witnesses, and presenting evidence. See Argersinger v. Hamlin, 407 U.S. 25 (1971); Powell v. Alabama, 287 U.S. 45 (1932).

Under Arkansas law the same jury that sits to hear evidence as to guilt also determines penalty. Ark. Stat. Ann. § 41-1301 (Repl. 1977). Penalty is determined at a separate hearing devoted exclusively to that issue. Id. In order to achieve a death penalty, the State must prove the existence of aggravating circumstances beyond a reasonable doubt. Ark. Stat. Ann. § 41-1302 (Repl. 1977)

Since the penalty phase of an Arkansas capital case is separate from guilt and places the burden of proof on the State, it is for all intents and purposes a trial. Accord, Bullington v. Missouri, __U.S.__, 68 L. Ed. 2d 270 (May 4, 1981). This Court has given a tacit admission that the due process rights of the defendant are protected at this phase of the trial. Estelle v. Smith, __U.S.__, 68 L. Ed. 2d 359 (May 18, 1981). The question presented here is whether this includes the protection of effective assistance of counsel.

Assistance of counsel involves something more than mere presence in the courtroom. This assistance of counsel continues through the penalty phase of a bifurcated trial.

See Gardner v. Florida, 430 U.S. 349 (1977); cf. Presnell v. Georgia, 439 U.S. 14 (1978). The federal courts, in habeas review of capital cases, have recognized the duty of counsel to exercise diligence in locating and presenting witnesses during the penalty phase of a capital trial. Voyles v. Watkins, 489 F. Supp. 901 (N. D. Miss. 1980). Counsel has a duty to use this diligence for preparation of the penalty phase. Blake v. Zant, 513 F. Supp. 772 (1981).

On the record in Petitioner's case, no evidence was presented in the mitigation. This is despite the fact that at the least there was indication of psychiatric evidence which would be relevant [R. 13] and applicable in mitigation under Arkansas law. Ark. Stat. Ann. § 41-1304(1)(2)(3) (Repl. 1977). Since the defendant bears the burden of presenting evidence of mitigating circumstances to avoid a death penalty, when counsel fails to put on any evidence he is simply not providing effective assistance.

Under this circumstance, Swindler was virtually without counsel at the penalty phase. This Court should grant certiorari to determine if he was denied his right to effective assistance of counsel at the penalty phase as guaranteed by the Sixth and Fourteenth Amendments.

In the alternative, this Court should remand this matter to the Arkansas court and direct that a full and fair hearing be held as to why petitioner was not provided with effective counsel at the penalty phase.

II. PETITIONER WAS DENIED HIS RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO DEVELOP EVIDENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The Arkansas Supreme Court refused to consider Swindler's contention he had been denied effective assistance of counsel. The court instead made a factual finding based upon allegations made in the petition for permission to proceed to a hearing.

In Case v. Nebraska, 381 U.S. 336 (1965); this Court was asked to determine if the Fourteenth Amendment requires the States to afford a post-conviction remedy that offers an adequate corrective process for hearing federal constitutional claims. Before the case was heard, Nebraska passed a statute providing such relief. The writ was dismissed, but, in concurrence, Justice Brennan stated that a post-conviction remedy

> should be sufficiently comprehensive to embrace all federal constitutional claims. In light of Fay v. Noia, [372 U.S. 391], it should eschew rigid and technical doctrines of forfeiture, waiver, or default. 381 U.S. at 347.

Once a state chooses to provide post-conviction relief, the means it provides should be full and fair. See, e.g., Douglas v. California, 372 U.S. 353 (1963). Insofar as the Supreme Court entrusts state judicial systems with primary responsibility for enforcing federal constitutional rights in their state's administration of criminal justice, cf. Stone v. Powell, 428 U.S. 465 1976), this Court should assume that the state courts exercise broad post-conviction jurisdiction which is capable of a full and fair adjudication of federal rights.

Absent a broad hearing at which the prisoner can develop all of the factual predicates to his claims, such full and fair consideration has not occurred. See, Cuyler v. Sullivan, 446 U.S. 335 (1980); Townsend v. Sain, 372 U.S.

293 (1963). In a capital case, such as this, the importance of an adequate corrective process is particularly important.

The Arkansas Supreme Court does not provide an adequate process for safeguarding these claims. The rule provides that no proceedings may be entertained without prior permission of the Supreme Court. Rule 37.2, Ark. R. Crim. P. (Repl. 1977). The rule exists to determine whether a basis for collateral attack exists, Swisher v. State, 257 Ark. 24, 514 S.W. 2d 219 (1974), and, if so, to grant permission to proceed with a hearing in the trial court. Neal v. State, 270 Ark. 442, 605 S.W. 2d 421 (1980). In practice, the Court has required "evidence" in order to proceed to an evidentiary hearing by characterizing the grounds raised as mere "allegations." Collins v. State, __Ark.__, 611 S.W. 2d 182 (1981). A presumption is entertained that a license to practice law makes counsel effective, absent proceedings becoming a farce and mockery. Leasure v. State, 254 Ark. 961, 497 S.W. 2d 1 (1973).

Yet even where the proceedings reveal gross inadequacy, the Court will not step in absent an objection at trial. French v. State, __Ark.__, 609 S.W. 2d 42 (1980) (concurring opinion of Judge Hickman); further, a defendant may not raise ineffectiveness on direct appeal, absent objection at trial. Sumlin v. State, __Ark.__, 617 S.W. 2d 372 (1981). Under these circumstances, no adequate hearing right exists as Rule 37 is applied by the Arkansas Supreme Court.

Petitioner raised significant issues in his petition and ventured outside the record to establish the availabity of mitigation witnesses at the time of trial. (See Appendix B) These issues include (1) the failure to use available family members to testify regarding character traits; (2) the failure to use available psychiatric evidence within the

Arkansas statute on mitigation; (3) the failure to use petitioner, who had testified in the guilt phase; (4) the failure to use a friend that had corresponded with petitioner; and (5) failure of counsel to discuss mitigation with Swindler to determine potential witnesses.

This Court should grant certiorari to consider this question and remand the case to the Arkansas Supreme Court with directions to enter an order allowing Swindler to proceed to the trial court for a full evidentiary hearing on the claims.

III. PETITIONER WAS DENIED A FAIR TRIAL BY AN IMPARTIAL JURY IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS BECAUSE A STATE LAW PERMITTING ONLY ONE CHANGE OF VENUE WAS UNCONSTITUTIONALLY APPLIED TO DENY A SECOND CHANGE OF VENUE.

Petitioner's first conviction was reversed for failure to grant a change of venue. Swindler v. State, 264 Ark. 107, 569 S.W. 2d 120 (1978). A change of venue was granted on retrial to an adjoining county. Under Arkansas law a second change of venue is not permitted.

> ...and in no case shall a second removal of the same cause be allowed. Ark. Stat. Ann. § 43-1507 (Repl. 1977)

In that case 62 jurors were examined and 23 were excused for cause; eleven jurors knew of petitioner's background. 264 Ark. at 112, 569 S.W. 2d at 123. On retrial 110 of 120 jurors called had knowledge of the case and 79 were excused for cause. [R. 684 - 1241] Throught voir dire, jurors acknowledged having information about the case from outside sources [R. 908, 961, 1042-45, 1051, 1120, 1139, 1153, 1170, 1187, 1204, 1253, 1261, 1286, 1329, 1362, 1380, 1413, 1432, 1435, 1443, 1448, 1451, 1470] and the judge never admonished the venire not to read or listen to news reports regarding the case. There is evidence that jurors received information as they awaited voir dire. [R. 1195, 1214, 1498] No juror volunteered to the trial judge that this was occurring. Counsel and the trial court had numerous discussions about another change of venue or mistrial, but felt bound by the Arkansas statute. On appeal the Arkansas Supreme Court dismissed allegations of a prejudiced jury, stating:

> While Swindler's counsel moved six times for a mistrial or change of venue during the 5 days' voir dire examination, no evidence at all was offered of pretrial

> publicity. No affidavits or testimony, showing pretrial publicity or ill feelings in the community...was offered... Swindler v. State, 267 Ark. 418, 424, 592 S.W. 2d 91, 94 (1979)

This ruling was made in reliance on Arkansas law requiring affidavits or testimony in support of a change of venue. Ark. Stat. Ann. § 43-1502 (Repl. 1977).

Petitioner contends his counsel was ineffective in failing to follow the basic statutory procedure of obtaining affidavits. Despite the fact that Arkansas law permits only one change of venue, the Arkansas Supreme Court made it clear the statutory procedures should be followed in seeking a second change of venue. Where the evidence elicited in voir dire so clearly indicates knowledge of the offense and the defendant, failure to follow the minimum steps to seek a change of venue cannot be characterized as improvident strategy.

Petitioner further contends that the case should be reversed because, applying the law to permit only one change of venue, the law was unconstitutionally applied to deny a fair trial. The Arkansas Supreme Court gave weight to protestations of impartiality in determing the jury to be fair and impartial. This is not the test set forth in Irvin v. Dowd, 366 U.S. 716 (1961). The sheer numbers of jurors with knowledge and opinions established a pattern suggesting a settled opinion regarding petitioner's guilt. The Arkansas Supreme Court relied on the "totality of the circumstances" test set forth in Murphy v. Florida, 421 U.S. 794 (1975). In applying that test the Arkansas court ignored the striking difference in Swindler and Murphy: throughout the Swindler voir dire jurors narrated their knowledge whereas in Murphy the information was brought to the jurors by the defense counsel. 421 U.S. at 800-801, nn. 3, 4, 5.

This Court should grant certiorari to consider this question and reverse the conviction and remand the case for a new trial; alternatively, this Court should grant certiorari and remand the case with directions to enter an order allowing Swindler to proceed to the trial court for a full evidentiary hearing on the claims of ineffectiveness of counsel on the issue.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Arkansas should be granted and the decision of that court should be reversed. This Court should set this matter for oral argument on the issues outlined above.

Respectfully submitted,

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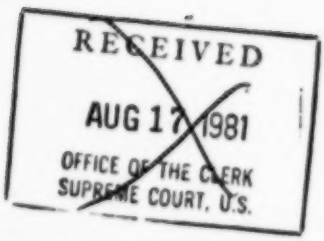
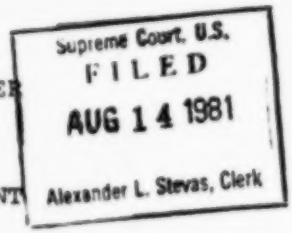


IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981



JOHN EDWARD SWINDLER.....PETITIONER

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APPENDIX

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SUPREME COURT OF ARKANSAS

No. CR 79-116

JOHN EDWARD SWINDLER, Petitioner v. STATE OF ARKANSAS, Respondent	Opinion Delivered PETITION TO PROCEED UNDER RULE 37 Petition Denied.

PER CURIAM

Petitioner, John Edward Swindler, brings this petition seeking post-conviction relief under Rule 37, A. R. Crim. P. (Repl. 1977) from his conviction for capital murder, Ark. Stat. Ann., § 41-1501 (Repl. 1977). He was sentenced to death by electrocution in that conviction, the date for execution being originally set for March 21, 1981. On March 13, 1981, petitioner sought a stay of execution, and on March 16, 1981, filed this petition for post-conviction relief under Rule 37. On March 18, 1981, we granted the stay of execution in order that we might properly consider the present petition to proceed under Rule 37. The petition has been considered and is now denied, and we dissolve the stay of execution granted in the order of March 18, 1981.

We see no need to repeat the facts of this case, as they are fully stated in two previous decisions of this court. We will briefly summarize the proceedings up to the filing of this petition. John Edward Swindler was originally tried and convicted of capital murder in the 1977 death of Officer Randy Basnett of the Fort Smith Police Department. That conviction was appealed, however, and this court was compelled to reverse the conviction on the grounds that the trial court erred in failing to grant a motion for change of venue, and in empaneling three of the jurors in that case. Swindler v. State, 264 Ark. 107, 569

S.W.2d 120 (1978). Following that remand, the petitioner was again tried, in a different court, and again convicted and sentenced to death. On direct appeal from this second conviction, we affirmed the trial court in an opinion more thoroughly discussed hereafter. Swindler v. State, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. den., ___U.S.___, 101 S.Ct. 630, 66 L.Ed. 511 (1980).

Rule 37.1 provides:

> A prisoner, in custody under sentence of a circuit court and whose case was not appealed to the Supreme Court, claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:
>
> (a) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or
>
> (b) that the Court imposing the sentence was without jurisdiction to do so; or
>
> (c) that the sentence was in excess of the maximum authorized by law; or
>
> (d) that the sentence is otherwise subject to collateral attack; may file a verified motion at any time in the court which imposed the sentence, praying that the sentence be vacated or corrected.

Rule 37.2 makes clear that if the petitioner has previously brought a direct appeal of his conviction to the Supreme Court then no proceeding may be brought in the trial court without prior consent of this court, as the present petition seeks. In applying Rule 37, we have made clear as in Hulsey v. State, 268 Ark. 312, 595 S.W.2d 934 (Opinion delivered March 31, 1980):

> This postconviction remedy was not intended to provide a method for the review of mere error in the conduct of the trial or to serve as a substitute for appeal. Hulsey, at 313.

Even questions of consitutional dimension are not preserved beyond the direct appeal of the conviction unless they are shown to be of such a fundamental nature that the judgment is rendered void.

> All these questions, and doubtless scores of others, might have been raised at the trial and thereafter on the first appeal, but they were not. Although they are argued as constitutional questions, they do not raise issues so fundamental as to render the sentence and the judgment void and open to collateral attack. Such constitutional questions are waived if not raised in accordance with the controlling rules of procedure. [Citations omitted.] In this court, contentions not argued by the appellant - in this instance on the first appeal - are waived. Hulsey, at 315.

See also, Collins v. State, 271 Ark. 825, 611 S.W.2d 182 (1981) and Rogers v. State, 265 Ark. 945, 582 S.W.2d 7 (1979).

In the petition for post-conviction relief under Rule 37, the petitioner argues: 1) that he was denied a fair trial by a fair and impartial jury; specifically a) the court erred in seating certain persons who allegedly had formed opinions in the case; b) the trial judge failed to admonish the jury concerning publicity surrounding the trial; and c) that there should have been a change of venue; and 2) that he did not receive effective counsel; specifically a) counsel failed to make certain objections at voir dire and b) failed to present certain testimony of mitigating circumstances at the sentencing phase of trial.

First, we note that in our decision on the direct appeal, Swindler v. State, 267 Ark. 418, 592 S.W.2d 91 (1979), the allegations of the change of venue request, the voir dire examination, and the seating of the jury were all reviewed. Therefore, we will not consider the petitioner's argument for relief based on issues arising out of those proceedings.

> It (Rule 37) is not intended to permit the petitioner to again present questions which were passed upon direct appeal. Hulsey v. State, supra. Nor does it permit a petitioner to raise questions which might have been raised at the trial or on the record on direct appeal....

Neal v. State, 270 Ark. 442, 605 S.W.2d 421 (1980), at 447. What is left, then, of the petitioner's request is the broad allegation of ineffectiveness of counsel at the sentencing phase of the trial. The allegation of ineffectiveness of counsel at the sentencing phase of the trial is based on the alleged failure of trial counsel to call

certain witnesses and to develop certain testimony as to mitigating circumstances. However, as we pointed out in Leasure v. State, 254 Ark. 961, 497 S.W.2d 1 (1973):

> The calling of witnesses in a criminal trial is a matter which is normally within the realm of judgment of counsel. At 968.

We remain unconvinced from the bare allegations of the present petition as to what might, or conceivably could have been used in the sentencing phase, that defense counsel was ineffective. Any error of omission by counsel was not of such grave nature "as to render the judgment void and open to collateral attack." Neal, at 447.

We do not find any merit in the petitioner's request to proceed under Rule 37 under the requirements set for such proceedings in our decisions of Neal, Hulsey, Rogers and Collins, above. Petitioner's petition to proceed under Rule 37 will therefore be denied. Our order of March 18, 1981, granting petitioner a stay of execution is dissolved, petitioner having exhausted all remedies recognized by this state.

Petition denied.

THIS IS A CAPITAL CASE
EXECUTION IS IMMINENT

IN THE SUPREME COURT OF ARKANSAS

JOHN EDWARD SWINDLER — PETITIONER

v. — No. CR 79-116

STATE OF ARKANSAS — RESPONDENT

PETITION FOR PERMISSION TO PROCEED
PURSUANT TO RULE 37, A.R.CRIM. P. (REPL. 1977)

Comes the petitioner, John Edward Swindler, through his counsel, serving *pro bono publico*, and for his petition states:

1. Petitioner was charged with capital murder in the Sebastion Circuit Court. After trial by jury, petitioner was convicted on said charge and sentenced to death by electrocution. This original conviction and sentence were reversed by this Court because of the pervasive, prejudicial pretrial publicity. *Swindler v. State*, 264 Ark. 107, 569 S.W.2d 120 (1978). Upon retrial petitioner was granted a change of venue to the Scott Circuit Court. Petitioner was again convicted and sentenced to death by electrocution. This Court affirmed the second sentence and conviction. *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), *cert. denied*, ___U.S.___(December 8, 1980).

On December 21, 1980, Governor Bill Clinton issued an executive proclamation scheduling petitioner's execution for Saturday, March 21, 1981. Petitioner filed a petition for stay of execution on Friday, March 13, 1981, with this Court, stating *inter alia* that this petition would be filed on Monday, March 16, 1981, and asking that this Court stay the pending execution until considering the merits of this petition. Action needs to be taken on the petition for stay of execution forthwith.

2. This Court has approved a procedure for seeking post-conviction relief. Rule 37, A.R.Crim.P. (Repl. 1977).

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This rule grants this Court jurisdiction over such matters. Further, this Court has specifically reserved jurisdiction over Rule 37 petitions as opposed to sending these petitions to the Arkansas Court of Appeals for consideration. Rule 29.1(e), Rules of the Supreme Court (Repl. 1980).

3. Petitioner must file with this Court a petition for permission to proceed to the trial court for an evidentiary hearing. Rule 37.2(a), A.R.Crim.P. (Repl, 1977). This petition must state grounds contained in Rules 37.1, A.R.Crim.P. (Repl. 1977). Failure to raise all grounds for available relief in the original, or amended, petition serves as a waiver of those grounds. Rule 37.2(b), A.R. Crim.P. (Repl. 1977). This petition must be filed within three years of the date of commitment unless the grounds for relief would render the judgment absolutely void. Rule 37.2(c), A.R.Crim.P. (Supp. 1979).

4. Petitioner is filing the required petition and is alleging grounds that he believes are a basis for remanding this matter to the trial court for an evidentiary hearing. Further, this petition is being filed within three years of the date of petitioner's commitment on October 26, 1978. Therefore, this petition is timely filed.

5. Petitioner notes that this Court has criticized counsel in the past for misconstruing the purpose or function of Rule 37, A.R.Crim.P. (Repl. 1977), and for raising as grounds for relief matters that this Court feel have no basis. *Hulsey v. State*, ___Ark.___, 595 S.W.2d 934 (March 31, 1980), *rehearing denied*, ___Ark.___, 599 S.W.2d 729 (June 9, 1980), *cert. denied*, ___U.S.___(October 20, 1980); *Neal v. State*, ___Ark.___, 605 S.W.2d 421 (September 29, 1980); *Collins v. State*, ___Ark.___, ___S.W.2d___(February

2, 1981). Petitioner agrees with this Court that judgments of conviction need to have a finality to them at some point. *Collins v. State*, *supra*. Petitioner also notes that should he be unsuccessful before this Court, it is incumbent upon his counsel to seek a writ of *habeas corpus* in federal court. Before the jurisdiction of the federal court on such a writ may be granted, however, petitioner must show that there has been an exhaustion of all available State remedies. 28 U.S.C. § 2254(b).

Since petitioner is represented by new counsel at this stage of the appellate proceedings, it is necessary that all available grounds for consideration be presented to this Court so there can be no question as to whether petitioner has exhausted his state remedies. Besides assuring that no waiver of petitioner's constitutional rights occurs, the procedure followed in this petition should accomodate the finality of a judgment in that it precludes the return to this Court on a particular point by the federal court for consideration as to exhaustion. If this Court misconstrues the intentions of counsel as to the procedure followed, counsel apologizes; however, counsel and petitioner affirmatively assert that this procedure is being followed in the best interests of petitioner. Further, petitioner affirmatively states that this petition is being filed in good faith and not for the purpose of delay and is an attempt to provide a logical, orderly progression through the various appellate remedies that may be available.

6. Petitioner notes that this petition may seem to be lengthy. In light of this Court's clarification as to the procedure to be followed, petitioner states all of his grounds for relief, with memoranda of law, in the petition.

Petitioner is not filing a separate statement of points and memorandum of law previously condemned by this Court. *Neal v. State*, *supra*, 605 S.W.2d at 423-424.

7. Petitioner's conviction and sentence should be vacated, and a new trial ordered, because he did not receive a fair trial before an impartial jury. Petitioner's rights under the Due Process Clause of the Fourteenth Amendment were thereby violated. Further, petitoner's rights under Article II §§ 8, 10 of the Arkansas Constitution, and Ark.Stat.Ann. § 43-1919 (Repl. 1977), were also violated.

While this Court has passed on certain aspects of this question, other parts of the issue have not been reviewed. Because the Due Process Clause requires a higher degree of certainty in a death penalty case, *see, Gardner v. Florida*, 430 U.S. 349 (1977), and because of this Court's duty to review the record in a capital case for any error, whether argued on appeal on not, it is appropriate for this Court to now consider this point. Rule 36.24, A.R.Crim.P. (Repl. 1977).

The standard for reviewing this question were set forth by the United States Supreme Court in *Irvin v. Dowd*, 366 U.S. 717 (1961). The seating of a juror who has formed an opinion violates the Due Process guaranty of an impartial jury. The mere existence of opinion, without more, is insufficient to rebut a presumption of impartiality if the juror can lay aside that opinion. Review of the *voir dire* examination is a mixed question of law and fact. Where there is a pattern suggesting a settled opinion regarding guilt, a juror's protestation of impartiality should be given little weight.

In *Murphy v. Florida*, 421 U.S. 794 (1975), the Court confirmed the views expressed in *Irvin v. Dowd*, *supra*, noting that the totality of the circumstances of the case should be reviewed in determining whether a criminal defendant obtained trial by an impartial jury. The law in this State is in accord with those decisions. This Court has added that

> ...where the juror testifies that he is not one hundred percent sure that he can lay aside his previous impressions or opinions, we do not see how any discretion on the part of the court can add any assurance that the verdict will be rendered only upon the evidence presented in court. *Swindler v. State*, 264 Ark. at 113, 569 S.W.2d at 124 [Hereafter *Swindler I*].

The appeal of this cause dealt with the denial of mistrial and motion for change of venue with created by publicity problems. *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979) [Hereafter *Swindler II*]. This analysis in the second case overlooked significant problems which, viewed in their totality, denied petitioner a fair trial.

A review of the totality of the circumstances reveals the following:

A. Jury selection at the second trial took five days. To select a panel of twelve jurors and one alternate, 126 venirepersons were examined. Of the 120 called before a panel was selected, 113 were asked if they had any knowledge about the case. 110 answered that yes they did have prior knowledge.

Of these, nine initially denied that they knew anything about the case. Some jurors had slight information. Others had closely followed the case up to, and through, *voir dire*.

B. The trial court, while often exercising great care in *voir dire*, made significant errors that require

this Court, in exercise of its supervisory powers, to vacate the judgment and order a new trial. Article VII § 4, ARK. CONST. *Cf., In re Rules of Criminal Procedure*, 259 Ark. 863, 530 S.W.2d 672 (1975); *Murphy v. Florida*, *supra*.

The trial court was extremely inconsistent in determining whether a particular venireperson's protestations of impartiality were acceptable. Every juror who acknowledged familiarity with the petitioner or the case gave this information without prompting. This Court's attention is drawn, for illustrative purposes, to the following:

1. Venireperson Oakes, when asked what he knew about the case, gave answers regarding petitioner's background, prior trial and reversal. [R. 755].

2. Venireperson Sunderman answered questions with similar information. [R. 971-980].

3. Venireperson Crase, after initially trying to deny any knowledge about the case, revealed that he had information regarding petitioner's capture and prior background [R. 999-1004].

4. Venireperson Jones, indicated knowledge of the events prior to and after the first trial, and indicated that he knew of anticipated defenses from reading about the case the day before his *voir dire* [R. 1153-1163].

5. Venireperson Bricksey, knew of petitioner's background, other charges petitioner was facing, the first trial petitioner received, and that he would have difficulty putting this information aside [R. 1295-1319].

6. Venireperson Holland, after initially denying any knowledge, stated that he knew about the case from recent news on television. [R. 1355]

7. Venireperson Blythe, noted that everyone knew about the crime [R. 1392-1395].

8. Venireperson Montgomery, knew about the prior trial and had been listening to newscasts about the pending trial [R. 1451-1469].

9. Venireperson Wilson had read about the case and heard a potential juror discussing the case [R. 1490, 1497-1498].

This is not, by any means, a complete list of the type of information that the venirepersons gave about their prior knowledge of this case. This situation should be contrasted with that in *Murphy v. Florida*, *supra*, where defense counsel brought much of the information before the panel by asking leading questions on *voir dire*. 421 U.S. at 800-801, nn. 3,4,5.

Despite the familiarity of potential jurors with the facts of the case, and the large number that were convinced prior to trial of petitioner's guilt, the trial court did little to abate the situation.

Voir dire took five days. [R. 684-1241]. The trial court *never* admonished jurors or potential jurors not to read about the case or listen to radio or television newscasts. This admonition was never given despite the fact that potential jurors acknowledged that they were obtaining new and recent information. *See, e.g., Venireperson Neal* [R. 808].

On the second day of jury selection, four venirepersons noted that they had heard recent information. [R. 908; 961; 1042-1045; 1051].

On the third day of jury selection, six persons advised that they had recent information. [R. 1120; 1139; 1153;

1170; 1187; 1204]. One of these venirepersons, Thurman Jones, acknowledged reading a complete account of the case while awaiting *voir dire*.

On the fourth day of jury selection, six persons acknowledged having read or heard recent news accounts about the case. [R. 1253; 1261; 1286; 1329; 1362; 1380].

By the fifth day of jury selection, seven persons acknowledged having read or heard recent news accounts. [R. 1413; 1432; 1435; 1443; 1448; 1451; 1470]. Three of the six persons interviewed as alternates had read or heard recent news accounts. [R. 1490; 1511; 1518].

Despite these repeated indications that jurors were receiving, and were interested in receiving, information about the case from sources outside the courtroom, the trial court did not admonish them to not read news accounts. He did "suggest" to the first two jurors seated that they not read or listen to accounts of the trial. [R. 969; 986]. The trial court did not make this suggestion to the other persons that were selected as jurors or alternates.

Admonitions that the trial court gave were clearly violated, but still the trial court took no action. Only the bare requirements of Ark.Stat.Ann. § 43-2122 (Repl. 1977), were met. Despite indications that this was insufficient, the trial court did nothing further.

On the first day of *voir dire* the trial court instructed the jurors not to discuss the case among themselves or to let it be discussed in their presence. Some potential jurors violated this instruction.

1. Venireperson Pica mentioned having heard gossip in the hall--apparently referring to persons await examination [R. 1195].

2. Venireperson Hunt stated that something was said to him while he was awaiting examination [R. 1214].

3. Venireperson Wilson, who was questioned on the fifth day, stated that she heard an opinion expressed by another potential juror [R. 1498].

These comments were being made in front of the trial court the last three days of jury selection. Potential jurors were clearly not obeying the trial court's instructions. The record reflects that the trial court made no effort to determine the source of these varied comments, who had heard them, or who had made them. As a minimum, those selected as jurors should have been questioned. *See, Mosely v. State*, 258 Ark. 485, 527 S.W.2d 616 (1973); *Hutcherson v. State*, 262 Ark. 535, 558 S.W.2d 156 (1977); *Wright v. State*, 267 Ark. 264, 590 S.W.2d 15 (1979).

It is clear that the record does not reflect a single instance of any juror, or potential juror, voluntarily notifying the trial court of these comments. It is also clear than an approach to a juror may have necessitated a mistrial. Here the lack of inquiry by the trial court is fatal to the State's claim that petitioner received a fair trial.

This entire situation draws into question the finding that the jury was impartial. It is a critical question where, as here, a defendant's life is at stake. *Irvin v. Dowd, supra.*

The totality of the circumstances of this jury selection require this Court to set aside this conviction and sentence and return this case for a new trial. Speculation that jurors were not tainted is insufficient where there were clear violations of the trial court's partial admonitions, where the admonitions were insufficient in light of the information available to the trial court, and where no action

was taken by the trial court, of petitioner's trial counsel, to explore or minimize the violations of the trial court's instructions.

C. Petitioner did not receive effective assistance of counsel as to obtaining a fair trial by an impartial jury. Because of this ineffectiveness, the judgment should be vacated and a new trial ordered. In the alternative, without waiving the above request, permission should be granted to proceed to the trial court for a hearing to determine whether counsel was effective in his attempts to obtain an impartial jury.

The specific reasons petitioner raises to support these grounds are:

1. Trial counsel failed to obtain affidavits or make a record regarding adverse, pervasive, prejudicial pretrial publicity to support a second change of venue pursuant to Ark.Stat.Ann. § 43-1502 (Repl. 1977).

2. Trial counsel failed to peremptorily challenge certain jurors. Specifically, these jurors are: Henry Sunderman [R. 985]; Thurman Jones [R. 1164]; Milton Skaggs [R. 1241].

3. Trial counsel failed to question the previously mentioned jurors with respect to whether they were one hundred percent sure that they could set aside prior knowledge and opinions about the case. This answer to this question would have supported petitioner's challenge of these jurors for cuase. *Swindler I.*

4. Trial counsel failed to request an admonition from the trial court to potential jurors to not read or listen to news accounts regarding the case both during jury examination, and after selection for jury service.

5. Trial counsel failed to request an investigation into the nature of opinions being expressed among potential jurors and whether those selected had been infected by these opinions. Since potential jurors were violating the trial court's partial admonition to not discuss the case, there is no reason to believe that jurors protestations that they could, or would, set aside prior opinions were true.

6. Trial counsel failed to move that petitioner be granted additional peremptory challenges because of the widespread prior knowledge of the case expressed by potential jurors. *See, Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976).

These failures by trial counsel cannot be characterized as mere omissions or mistakes in strategy. The record reflects a misunderstanding of the law on venue by counsel to the extent that not even basic procedures were followed in order to effect a second change of venue. [R. 751; 876; 1071-1074; 1243-1245; 1405-1409; 1528-1559]. Or, as this Court succintly stated

> While Swindler's counsel moved six times for a mistrial or change of venue during the 5 days' *voir dire* examination, no evidence at all was offered of pretrial publicity. No affidavits or testimony, showing pretrial publicity of ill feelings in the community as a result of the killing, was offered, as they had been in [*Swindler I*] or *Ruiz & Van Denton v. State*, *supra*.
>
> Our law provides affidavits or sworn testimony must be offered to support a motion for change of venue. Ark.Stat.Ann. § 43-1502. *Swindler II*, 267 Ark. at 424; 592 S.W.2d at 94 [Clarification added].

8. Petitioner was denied trial by a jury selected from a cross section of the community, and inadequate assistance of counsel because the jury was qualified to render a death penalty. Trial counsel was inadequate in that it

failed to request a hearing, or to put on evidence that juries qualified to render a death penalty were prosecution prone, and did not represent a fair cross section of the community. *See, Grigsby v. Mabry*, 483 F.Supp. 1372 (E.D.Ark. 1980, *aff'd as modified*, ___F.2d___(8th Cir. 1981).

9. Petitioner states a a ground for relief that he was denied effective assistance of counsel at the penalty phase of the second trial. Specifically, petitioner states that trial counsel was ineffective in failing to object to the introduction of a prior conviction for armed robbery on the basis that the judgment of conviction does not clearly show that petitioner was represented by counsel. Further, trial counsel was ineffective in failing to use due diligence to investigate and prepare for presentation to the jury evidence as to mitigating circumstances. Petitioner states that this evidence would have been readily available if trial counsel had merely asked petitioner for this information, or had properly investigated information provided petitioner by the State through discovery.

In making this argument, petitioner first notes that the United States Supreme Court has recognized that the penalty phase of a capital case is to be judged on equal footing as the guilt phase in determining if Due Process rights of the defendant have been protected.

> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

The right to counsel, in a state prosecution, is a Due Process right. The Sixth Amendment right to counsel has been applied to the States through the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v.*

Alabama, 287 U.S. 45 (1932). Therefore, this right to counsel attaches to the penalty phase of a capital case.

To sustain an allegation of ineffective assistance of counsel at the penalty phase of the trial, petitioner must demonstrate that counsel was ineffective. *McDonald v. State*, 257 Ark. 879, 520 S.W.2d 292 (1975). The showing must be more than an allegation that because of errors, omissions, or improvident strategy, counsel was ineffective. *Clark v. State*, 255 Ark. 13, 498 S.W.2d 657 (1973).

If the allegation of ineffective counsel is couched solely in terms of matters of judgment, then a hearing on the issue is not required. *Leasure v. State*, 254 Ark. 961, 497 S.W.2d 1 (1973). Further, a hearing is not required if petitioner has had an adequate opportunity to raise the issue in the trial court, or on direct appeal. *Hilliard v. State*, 259 Ark. 81, 531 S.W.2d 463 (1976). If, however, a hearing is ordered on this issue petitioner must show by clear and convincing evidence that trial counsel was so patently lacking in competence at the penalty phase that it became the duty of the trial court to be aware of this incompetence and to correct it. *Collins v. State*, ___Ark.___, ___S.W.2d___(February 2, 1981).

Petitioner accepts the burden that he must show at a hearing that trial counsel was ineffective at the penalty phase. This issue could not have been raised on direct appeal since trial counsel prepared petitioner's direct appeal. The request for a hearing is in accordance with this Court's direction

> If the accused did not have adequate opportunity to raise the question in the trial court before appeal, he can raise the question by motion for post conviction relief. *Hilliard v. State*, *supra*, 259 Ark. at 84, 497 S.W.2d at 2.

Petitioner is requesting the opportunity that this Court has requested--i.e, to present to the trial court the allegations that trial counsel was ineffective at the penalty phase of the trial.

A. The first argument is that trial counsel failed to properly object to the entry into evidence at the penalty phase of a prior judgment of conviction. The judgment of conviction was for the offense of armed robbery as an accessory before or after the fact. [R. 2188] The judgment does not make clear on its face that petitioner was represented by counsel at trial or plea on this charge.

Dealing with the habitual offender trials, this Court has held that if the judgment of conviction does not make clear that the defendant was represented by competent counsel, there is a presumption that the defendant was not represented and the conviction cannot be introduced into evidence. The jury is not allowed, in that situation, to use the conviction for its consideration of increased penalties. *Reeves v. Mabry*, 480 F.Supp. 529 (E.D.Ark. 1979); *Wilburn v. State*, 253 Ark. 608, 487 S.W.2d 600 (1972); *Klimas v. State*, 259 Ark. 301, 534 S.W.2d 202 (1976). Petitioner contends that this standard should also apply to the penalty phase of a capital case. This assertion is particularly true since this judgment was the only competent evidence that could show beyond a reasonable doubt that petitioner had, at the time of the capital murder, previously committed a felony, an element of which was the use, or threatened use, of force or violence. Ark.Stat.Ann. § 41-1303(3) (Crim.Code 1976). [R. 2204]

There are some names that appear on the judgment of conviction that might be that of defense counsel. However,

this matter should not have been left to speculation by the trial court. This Court has previously ruled, in another context, that the initials of a municipal judge could not be an indication that a judicial officer actually ordered the issuance of an arrest warrant. Since this requirement was not shown, the arrest warrant was ruled invalid. *Webb v. State*, ___Ark.___, 601 S.W.2d 848 (1980). In another context, this Court has held that if a name is misspelled on a judgment of conviction, it will not be assumed to be that of the alleged habitual offender. *Leggins v. State*, ___Ark.___, 590 S.W.2d 22 (1979). Finally, even if the names on the judgment may be defense counsel, the judgment is subject to possible collateral attack since a conflict of interest appears because one attorney represented multiple defendants. *Holloway v. Arkansas*, 435 U.S. 475 (1978).

From the above, it is clear that these are not matters that should have been left to speculation. Further, these are matters that an effective trial attorney would have researched and properly presented to the trial court. Moreover, these are issues that the trial court should have been aware of and, even if counsel had not objected, should have precluded since the trial court has an obligation to follow the rulings of this Court on such issues.

B. The second issue presented on this point is that trial counsel totally failed to present any mitigation evidence, or to investigate the availability of mitigation evidence, for use at the penalty phase of the trial. Specifcally, trial counsel did not investigate or try to use any of the following:

1. The fact that petitioner had family members that could have testified as to particular character traits

of his that could have been used as mitigating evidence. Petitioner's present counsel have been in contact with members of petitioner's family and have learned of evidence that related to petitioner's mental condition, his prior work record when not in the penitentiary, and his ties to his family. This information was gleaned merely from asking petitioner about family members and making telephone calls to those family members.

2. The fact that a psychiatrist had examined petitioner prior to the first trial and found him to be hysterical with evidence of paranoid delusions of grandeur and persecution. [R. 13] While this evidence may not have been sufficient to warrant an acquittal by reason of mental disease or defect, it should have led to further investigation to show the applicability of the mitigating circumstances listed in Ark.Stat.Ann. §§ 41-1304(1)(2)(3)(Crim.Code 1976). In further investigation of this matter, present counsel have learned that determinations by the Arkansas State Hospital primarily concern whether a defendant suffers from a psychosis that is so severe as to render him incompetent to stand trial. The information, from Dan Donahue, Ph.D., a clinical psychologist at the Arkansas State Hospital, was learned merely by making a telephone call. Dr. Donahue further stated that in making its determination, the staff does not even consider the possibility that this evidence may be used to show mitigation during the penalty phase of a capital trial. When questioned further about this report concerning petitioner, Dr. Donahue indicated that a follow up investigation could have provided information that would make applicable the mitigating circumstances listed above.

3. The fact that petitioner was not used as a witness again during the penalty phase of the trial. This failure is particularly relevant in light of the prosecuting attorney's closing argument that petitioner had not shown any remorse at the fact a human life had been taken, regardless of the claim of justification. [R. 2141].

4. The fact that a correspondent of petitioner's--Mrs. Francis Nixon--had gleaned insight into petitioner's character during their communications between the first and second trials in this matter. This information could have been used in mitigation to show personality traits and petitioner that would justify the jury allowing him to escape the death penalty. This information was learned merely by asking petitioner and making a telephone call to Mrs. Nixon.

Petitioner contends that these matters were never discussed with him by counsel in the preparation for the trial of this matter. In short, except for the proposed testimony of Mr. Don Reid, there was no preparation for this phase of the trial. Of course, petitioner again asserts that the failure of the trial court to permit a brief continuance so Mr. Reid could appear to give information about rehabilitation about death row prisoners was error. This assertion is particularly true in light of the fact that Mr. Reid could have evidently been present had the trial not been previously delayed so a juror could attend a funeral. It is noted that this delay occurred despite the fact that alternate jurors had been chosen which could have prevented the delay.

It has been noted that it is debatable whether to call the defendant in a capital case as a witness during the

penalty phase of a capital case after he has served as a witness during the guilt phase. *Voyles v. Watkins*, 489 F.Supp. 901 (N.D.Miss. 1980). However, it was further noted in that case that the presentation of the kind of evidence petitioner outlined above would have supported the trial court's instructions as to mitigation.

> The lack of any mitigating evidence resulted from the failure of defense counsel to exercise diligence in locating and presenting witnesses who were in position to establish traits of good character. *Voyles v. Watkins*, *supra*, 489 F.Supp. at 909.

Of course, as has been noted by the United States Supreme Court, evidence as to character traits is certainly admissible during the penalty phase of a capital case. *Lockett v. Ohio*, 438 U.S. 586 (1978). This mandate is consistent with the language of Arkansas' statute concerning mitigating circumstances. Ark.Stat.Ann. § 41-1304(Crim.Code 1976).

Petitioner admits that he has had to go outside the record to present the above listed evidence for consideration by this Court. This is evidently the procedure approved by this Court for Rule 37 petitions. *Neal v. State*, *supra*. Indeed, the failure of counsel to go outside the record is evidently a basis for denying a petition to proceed to the trial court for an evidentiary hearing on the issue. *Collins v. State*, *supra*.

The failure of trial counsel to investigate and present this evidence, or to properly object to the admission of extremely damaging and inadmissible evidence, indicates that the penalty phase of this trial was rendered a farce and a mockery of justice. However, this is not the issue for this Court to determine at this stage. It is an issue for the trial court to determine. *Hilliard v. State*, *supra*.

Therefore, petitioner respectfully requests permission to proceed to the trial court for an evidentiary hearing on this issue of ineffective assistance of counsel at the penalty phase.

WHEREFORE, premises considered, petitioner prays that this Court: (1) enter a stay of execution forthwith until this petition can be considered on the merits; (2) that upon consideration of the petition, this Court vacate the judgment and sentence and remand this matter for a new trial; (3) that in the alternative, without waiving the above requests, that this Court remand this matter to the Sebastion Circuit Court, sitting on change of venue in the Scott Circuit Court, for an evidentiary hearing on the allegations contained herein.

Respectfully submitted,

CHARLES L. CARPENTER, JR.
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and

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807 West Third Street
Little Rock, Arkansas 72201
(501) 372-4040

By: Charles L Carpenter, Jr.

By: Thomas M. Carpenter

COUNSEL FOR PETITIONER, *Pro Bono Publico*

STATE OF ARKANSAS)
COUNTY OF PULASKI)

We, counsel for petitioner herein, do hereby certify that the above information is true and correct to the best of our knowledge and belief, and that this petition is being filed in good faith and not for the purpose of delay.

Charles L Carpenter, Jr. Thomas M. Carpenter

Subscribed and sworn to before me this 16th day of March, 1981.

Josie Foster
NOTARY PUBLIC

My commission expires:

CERTIFICATE OF SERVICE

I, Thomas M. Carpenter, one of counsel for petitioner herein, do hereby certify that a true and correct copy of the foregoing petition has been served on opposing counsel this 16th day of March, 1981, by hand delivering a copy of same to the Honorable Steve Clark, Office of the Attorney General, Justice Building, Little Rock, Arkansas.

Thomas M. Carpenter

A P P E N D I X

Day 1 - Oct. 16, 1978 Day 2 - Oct. 17, 1978 Day 3 - Oct. 18, 1978

Day 4 - Oct. 19, 1978 Day 5 - Oct. 20, 1978

JURORS WHO INITIALLY DENIED KNOWLEDGE - 9

1. Robert Oliver T. 955, 961
2. Shirley Limbocker T. 1014, 1019
3. Walter Goddard T. 1254, 1261
4. Oscar Stringer T. 1321, 1322
5. L. D. Casey T. 1324, 1324
6. J. E. Holland T. 1355, 1355
7. Farris Blythe T. 1387, 1392
8. Cora Owens T. 1413, 1422
9. Mickey Austin T. 1431, 1431

JURORS WHO HAD RECENT KNOWLEDGE - 27

1. James Neal, T. 808, Day 1
2. Sharon K. Self, T. 908, Day2
3. Robert Oliver, T. 961, Day2
4. Carolyn Gilbert, T. 1042,1045, Day 2
5. Earl Overton, T. 1051, Day 2
6. Billy Pat Franklin, T. 1120, Day 3
7. Richard Moore, T. 1139, Day 3
8. Thurman Jones, T. 1153, Day3
9. William Hartsill, T. 1170, Day 3
10. Lenora Pica, T. 1187, Day 3
11. Bobby Hunt, T. 1204, Day 3
12. Glen Dale Tull, T. 1253, Day 4
13. Walter Goddard, T. 1261, Day4
14. T. G. Wagner, T. 1286, Day4
15. L. D. Casey, T. 1329, Day 4
16. J.E. Holland, T. 1362, Day 4
17. John Robinson, T.1380, Day 4
18. Cora Owens, T.1413, Day 5
19. Jerry Carter, T. 1432, Day 5
20. L. Stokes, T. 1435, Day 5
21. J. Pope, T. 1443, Day 5
22. K. Cottingham, T. 1448, Day
23. J. Montgomery,T.1451,Day 5
24. K. Edmonson,T.1470,Day 5
25. H. Wilson, T.1490, Day 5
26. E. Dendman, T.1511, Day 5
27. H.Robinson, T. 1518, Day5

OFFICE OF THE CLERK
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ARKANSAS COURT OF APPEALS
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DEPUTY

May 26, 1981

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LESSENBERRY & CARPENTER
807 WEST 3RD.
LITTLE ROCK, AR 72201

Thomas M. Carpenter
Attorney at Law
807 West Third Street
Little Rock, AR 72201

Re: CR79-116 John Edward Swindler v. State of Arkansas

Dear Mr. Carpenter:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

Dona L. Williams

Dona L. Williams, Clerk

DLW:rh

cc: Attorney General
Governor's Office
Circuit Clerk

filed 9-14-81

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

NO. 81-5271

JOHN EDWARD SWINDLER — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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ATTORNEYS FOR RESPONDENT

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

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JOHN EDWARD SWINDLER — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Sixth and Fourteenth Amendment rights to effective assistance of counsel apply to the penalty phase of a bifurcated capital trial.

II. Whether due process in a capital case requires an opportunity to develop issues of ineffective assistance of counsel when ineffective assistance of counsel cannot be raised on direct appeal.

III. Whether a state statute that prohibits a second change of venue in a criminal case tainted by extensive prejudicial publicity violates a defendant's rights under the Sixth and Fourteenth Amendments to trial by a fair and impartial jury.

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II. PETITIONER WAS NOT DENIED HIS RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO DEVELOP EVIDENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL.....

II. PETITIONER WAS NOT DENIED A FAIR TRIAL BY AN IMPARTIAL JURY IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS BECAUSE A STATE LAW PERMITTING ONLY ONE CHANGE OF VENUE WAS NOT UNCONSTITUTIONALLY APPLIED TO DENY A SECOND CHANGE OF VENUE.....

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court denying petitioner's petition to proceed under Rule 37 of the Arkansas Rules of Criminal Procedure is reported at 272 Ark. 340, ____ S.W.2d ___ (1981) and is reproduced in the petitioner's appendix.

JURISDICTION

The petitioner has adequately set forth the jurisdictional grounds.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The relevant constitutional and statutory provisions were stated by petitioner.

STATEMENT OF THE CASE

Respondent concurs with petitioner's statement of the case with the exception of his allegation that he has been denied any meaningful review of his claim for post-conviction relief.

REASONS FOR DENYING THE WRIT

I. PETITIONER WAS NOT DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPTIAL MURDER TRIAL.

Petitioner initially asks this Court to review his conviction based upon his contention that he was "virtually without counsel" at the penalty phase of the trial. Petitioner's allegations were rejected by the Arkansas Supreme Court in its denial of his petition for post-conviction relief pursuant to Ark. R. Crim. P. 37, Ark. Stat. Ann. Vol. 4A (Repl. 1977 & Supp. 1979). Swindler v. State, 272 Ark. 340, ____ S.W.2d ____ (April 20, 1981).

Petitioner alleges that his counsel at trial failed to present evidence in mitigation despite the fact that there were indications that such evidence was available. Petitioner further alleges that, since the defendant bears the burden of presenting evidence of mitigating circumstances, when counsel fails to put on mitigating evidence he is not providing effective assistance.

This Court has held that a defendant is entitled to effective representation of counsel, Reece v. Georgia, 350 U.S. 85, 90 (1955). The Court has noted, however, that "all advice offered by the defendant's lawyer "need not" withstand retrospective examination in a postconviction hearing." McMann v. Richardson, 398 U.S. 759 770 (1970).

This Court has apparently declined to elaborate definitely on the standard to be applied in evaluating effective assistance of trial counsel. See McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974). Therefore, respondent respectfully submits that no more stringent standard should be applied here than was adopted by the Eight Circuit Court of Appeals in United States v. Easter, 539 F.2d 663 (8th Cir. 1976), cert. denied, 434 U.S. 844 (1977). This standard was summarized as follows in Dupree v. United States, 606 F.2d 829, 830 (8th Cir. 1979):

> The standard for determining the adequacy of counsel is whether the trial counsel exercised "the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." United States v. Easter, 539 S.2d 663, 666 (8th Cir. 1976), cert. denied, 434 U.S. 844 (1977). There is a presumption that counsel has rendered effective assistance. Thomas v. Wyrick, 535 F.2d 407, 413 (8th Cir.) cert. denied, 429 U.S. 868 (1976). To overcome the presumption, appellant must show that: (1) there was a failure to perform an essential duty owned [sic] by the defense attorney to his client; and (2) that the failure prejudiced the defense. McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974).

Petitioner cites cases for the proposition that counsel has the duty to exercise diligence in locating and presenting witnesses during the penalty phase of a capital trial. Appellant would not quarrel with this. However, counsel is not obligated to manufacture evidence if none exists. Collins v. State, 271 Ark. 825, 611 S.W.2d 182 (1981). The Arkansas Court specifically noted:

> Counsel did not put on any evidence during the penalty phase of the trial and petitioner alleges that this can only be deemed ineffective assistance of counsel. Petitioner fails, however, to cite any evidence that was available. Clearly, counsel is not obligated to manufacture evidence if none exists. Since petitioner presented no specific evidence that could have been presented in mitigation, we cannot say that counsel was remiss in not presenting testimony during the penalty phase.

271 Ark. at 835.

See also Gibson v. State, 351 So.2d 948 (Fla. 1977), cert. denied 434 U.S. 1004 (1978).

The Arkansas Supreme Court, in denying petitioner's Rule 37 petition, noted that the allegations made on this issue were based on the "alleged failure of the trial counsel to call certain witnesses and to develop certain testimony as to mitigating circumstances." Swindler v. State, 272 Ark. 340, ___ S.W.2d ___ (1981). The Arkansas Court cited Leasure v. State, 254 Ark. 961, 497 S.W.2d 1 (1973), wherein it was stated at page 968 of the opinion: "The calling of witnesses in a criminal trial is a matter which is normally within the realm of the judgment of counsel." The Court was therefore not convinced that petitioner's bare

allegations about what could have conceivably been used in the sentencing phase was sufficient to indicate that defense counsel was ineffective.

Respondent respectfully submits that the Arkansas Supreme Court ruled correctly in its denial of petitioner's Rule 37 petition and that petitioner has not sufficiently met his burden of proving that his trial counsel was ineffective.

II. PETITIONER WAS NOT DENIED HIS RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO DEVELOP EVIDENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner alleges that he was denied his right to due process under the Fourteenth Amendment because he was not granted an evidentiary hearing in the state trial court on his allegation that he was denied the effective assitance of counsel.

In challenging Rule 37 of the Arkansas Rules of Criminal Procedure, petitioner suggests that if a state provides for a post-conviction relief remedy, it should provide for a full and fair consideration of the rights involved. He contends that such fairness cannot occur absent the granting of a hearing. He contends that Rule 37 does not provide an adequate process for safeguarding these claims.

Respondent would note initially that this Court has never held that the Constitution compels the states to provide specific post-conviction procedures to persons claiming violations of their federal constitutional rights. Carter v. Illinois, 329 U.S. 173 (1946). Rather, this Court has stated that though the Constitution commands the states to assure fair judgment, wide discretion is left to the states in deciding the manner of adjudicating a claim that a conviction is unconstitutional. Young v. Ragan, 337 U.S. 235, 238 (1948); Hysler v. Florida 315 U.S. 411 (1946).

Therefore, petitioner has failed to raise an issue of constitutional proportion because this Court has never held

that the state equivalent of habeas corpus review is required under the United States Constitution. It has also been held that where such opportunity for relief is afforded, the scope of that review and the procedure by which relief may be granted are within the discretion of the state.

In support of petitioner's contentions, noted previously, he cites Douglas v. California, 372 U.S. 353 (1963); Stone v. Powell, 428 U.S. 465 (1976); Cuyler v. Sullivan, 447 U.S. 335 (1980); and Townsend v. Sain, 372 U.S. 293 (1963). These cases are all distinguishable and do not support petitioner's contentions. The issue in Douglas concerned the denial of assistance of counsel in the appellate process to indigent defendants based on a California rule of criminal procedure. Stone merely held that, where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial. Cuyler dealt with multiple representation by counsel and does not appear to be on point. Townsend held that a district court erred in denying a writ of habeas corpus without a hearing since it appeared that the petitioner had confessed while under the influence of a "truth serum" drug.

Since petitioner had previously directly appealed his conviction to the Arkansas Supreme Court, he proceeded under Rule 37.2(a). This provision requires the permission of the Arkansas Court before the defendant may proceed in the trial court with his contentions. This is because Rule 37 is designed to afford the opportunity for relief to defendants who have not otherwise had an opportunity for review of their claims of constitutional violations. It is not intended to provide a second appeal. Collins v. State, 271 Ark. 825, 828, 611 S.W.2d 182 (1981). Petitioner evidently

complains that he was denied due process because he was not granted an evidentiary hearing as a matter of right. However, this is not the purpose of the rule as noted above.

Petitioner's allegations have been reviewed by the Arkansas Supreme Court and found not to justify an evidentiary hearing. This holding was based both on the substance of the allegation and the purpose and scope of review under Rule 37. This is all petitioner is entitled to.

III. PETITIONER WAS NOT DENIED A FAIR TRIAL BY AN IMPARTIAL JURY IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS BECAUSE A STATE LAW PERMITTING ONLY ONE CHANGE OF VENUE WAS NOT UNCONSTITUTIONALLY APPLIED TO DENY A SECOND CHANGE OF VENUE.

Petitioner contends that Ark. Stat. Ann. §43-1507 (Repl. 1977) was unconstitutionally applied to deny him a fair trial and that his counsel rendered ineffective assistance by not seeking affidavits or testimony to support a second change of venue even in light of the statute.

As petitioner notes, this issue was decided on direct appeal by the Arkansas Supreme Court in Swindler v. State, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 101 S.Ct. 630, 66 L.Ed.2d 511 (1980). In responding to the argument concerning the second change of venue, the Arkansas Court noted:

> The second argument is meritless. The Arkansas law permitting only one change of venue, and that to a county within the judicial circuit, is not on its face unconstitutional. The case of Irvin v. Dowd, supra, does not support appellant's argument. The Court in Irvin ordered a trial in another county, contra to state law, because the trial judge refused a change of venue simply because state law forbade it. Also, the record in the Irvin case, like that in Swindler and Ruiz & Van Denton, was replete with evidence of pretrial publicity and a change of venue was necessary.
>
> It is not necessary for us to decide whether these venue laws can result in a denial of a right to a fair trial and due process of law. The question is, could Swindler receive a fair trial, by an impartial jury, in Scott County? We conclude he could.

267 Ark. at 427, 428.

The Arkansas Supreme Court also cited this Court's opinion in Irvin v. Dowd, 366 U.S. 716 (1961), wherein it was stated:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, wide-spread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. Illinois, 123 U.S. 131; Holt v. United States, 218 U.S. 245; Reynolds v. United States, supra.

366 U.S. at 722, 723.

Petitioner contends that the Arkansas Supreme Court erroneously relied upon the "totality of the circumstances" test set forth in Murphy v. Florida, 421 U.S. 794 (1975), because of differences between that case and his case and contends that the "sheer numbers" of jurors with knowledge and opinions established a pattern suggesting a settled opinion regarding his guilt. Respondent maintains that there is no showing of such a pattern. The Arkansas Court noted that the trial court took great pains in selecting the petitioner's second jury. It is apparent that much precaution was taken to insure that he received a fair trial. Respondent respectfully submits that petitioner has demonstrated no violation of his constitutional right to a fair and impartial trial.

In response to petitioner's argument that his trial counsel was ineffective for failing to present affidavits or testimony in support of a second change of venue, respondent would again assert that petitioner has failed to meet his burden on the issue and refer the Court to the respondent's arguments under respondent's first reason for denying the writ.

CONCLUSION

The Arkansas Supreme Court has reviewed each of appellant's allegations. It properly followed the decisions of this Court and correctly denied petitioner's request for relief.

Petitioner failed to meet his burden of proving ineffective assistance of counsel. His allegations on this issue were properly rejected by the Arkansas Supreme Court without the granting of an evidentiary hearing pursuant to Rule 37.

Finally the Arkansas Court correctly found that petitioner was tried by a fair and impartial jury.

THEREFORE, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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